(3)

Supreme Court, U.S.
FILED

931235 JAN 7 1994

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

H.RICHARD AUSTIN and
CORINNE AUSTIN ..PETITIONERS PRO SE

vs.

UNITED PARCEL SERVICE.....RESPONDENT

Petition for WRIT OF CERTIORARI to the VERMONT SUPREME COURT

APPENDIX

TO

PETITION FOR WRIT OF CERTIORARI

H. Richard Austin and
Corinne Austin
2126 Brook Hill Ct.
Saint Louis, MO.
63017
(314)-230-9268

RECEIVED
JAN 31 1994
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Appendix A

STATE OF VERMONT
WASHINGTON COUNTY, SS.

CORINNE AUSTIN and	WASHINGTON SUPERIOR
H.RICHARD AUSTIN	COURT
V.	DOCKET NO. S697-89

UNITED PARCEL SERVICE

ORDER ON MOTION FOR NEW TRIAL -
ALLEGATION OF FRAUD

On February 3, 1993, the Court ordered that the parties submit to the Court any new factual evidence to be offered at the hearing on the Motion for New Trial.

Neither party has new evidence, newly discovered facts or any new evidence of fraud to support or justify a new trial in this cause. No offer of new evidence nor any evidence of fraud was offered prior to the hearing on the Motion nor was any offered at the hearing.

The argument at the hearing was a reit-

eration of arguments presented long before trial, just before trial and at trial.

The Court adopted the plaintiff's arguments concerning the law at trial.

The law that plaintiff urges was the law that the Court charged.

When the UPS officer testified, plaintiff knew the state of the law and regulations concerning the dispute. That officer's testimony could have been impeached to a greater extent than was done and the final arguments might have been done differently, but there hasn't been sufficient ground shown to warrant granting of a new trial. There was nothing new or not known at trial nor is there anything new or not known since trial.

ORDER

The Motion for New Trial based upon fraud of Defendant is DENIED.

Dated at Montpelier, Vermont this 29th day of March, 1993.

DAVID A. JENKINS, SUPERIOR JUDGE

APPENDIX B

ENTRY ORDER

SUPREME COURT DOCKET NO. 92-239

OCTOBER TERM, 1993

Corinne and	APPEALED FROM:
H. Richard Austin	Washington Superior
v.	Court
United Parcel Service	DOCKET -S697-89 Wnc

In the above entitled cause the Clerk will enter:

Plaintiffs sued for damages arising from the alleged loss of a fur coat transported from Florida to Vermont and a jury found in defendant's favor. Plaintiffs now appeal the denial of their motion for relief from judgment. We affirm.

In 1989 plaintiff Corinne Austin brought two fur coats to a company called MailBoxes, Etc. (MBE) in Sarasota, Florida, for shipment to her son in Warren, Vermont, via United Parcel Service (UPS). The

complaint alleged that one of the two fur coats never arrived. During the course of the five-day trial, a number of threshold legal issues arose, including the question of whether plaintiff Corinne Austin was a "shipper" within the meaning of the federal Bill of Lading Act and Interstate Commerce Act.

On January 28, 1992, the jury found that MBE, not Mrs. Austin, was the shipper so that under UPS's theory of the case, her only recourse was against MBE, not UPS. However, the jury also found that the coat in issue was received by the son. On February 28, 1992, plaintiffs filed a motion for a new trial, which was denied on March 26, 1992. On April 21, 1992, plaintiffs filed a notice of appeal, but on July 2, 1992, they filed a motion styled as a "motion for remand," together with a motion entitled "motion for a new trial based on recently discovered fraud." The matter was remanded to the trial court for consideration of the second "new trial" motion, which was denied. This

appeal followed.

Plaintiffs' second "new trial" motion was a motion under V.R.C.P. 60(b)(3), which addresses relief from judgment based on evidence of fraud. In order to prevail under this rule, plaintiffs must prove that the judgment against them was obtained by fraud, misrepresentation or misconduct and that they were thereby prevented from fairly and fully presenting their case. See Bunch v. United States, 608 F2d 1271, 1283 (9th Cir.1982). Though directed by the court to describe allegedly newly discovered evidence of fraud fitting the requirement of Rule 60(b)(3), plaintiffs produced nothing that could be reasonably considered as such evidence. For example, one such piece of "evidence" was a letter from an assistant in the consumer affairs division of the Interstate Commerce Commission in response to a letter written by the plaintiffs on April 6, 1992 -- long after the verdict was entered. The letter does not show defend-

ant's possible fraud, misrepresentation, or misconduct. Furthermore, there is no reason why the letter could not have been obtained prior to trial. See In re M/V Peacock, 809 F.2d 1403, 1405 (9th Cir. 1987) (applying identical federal Rule 60(b)(3) to hold no relief under rule when no causal nexus between mispresentation and party's failure to successfully prepare for trial); see also Darken v. Mooney, 144 Vt. 561, 566, 481 A.2d 407, 410-11 (1984) (applying V.R.C.P. 60(b)(2) and holding that rule "does not operate to afford parties a chance to relitigate matters in which there was ample time to prepare" for trial). Thus plaintiffs were not prevented from fully and fairly presenting their case at the time of trial.

Plaintiffs' other claims of fraud and misrepresentation have no support in the record. The court accepted plaintiffs' view that the law required that the coat be delivered in person to the son, and the jury found such delivery occurred. In view of the ruling and the jury's finding, we

fail to see how plaintiffs' other claims could change the outcome.

Affirmed

BY THE COURT

Ernest W. Gibson III, Associate Justice
John A. Dooley, Associate Justice
Denise R. Johnson, Associate Justice

Vt. Supreme Court
Filed in Clerk's Office
October 22, 1993

APPENDIX C

UNITED PARCEL SERVICE
P.O. BOX 151059
ALTAMONTE SPRINGS FL 32715

SHIPPER TRACER RESPONSE
LDI NOTIFICATION

April 13, 1989

MICHELE
MAILBOXES ETC.
5053 OCEAN BLVD.
SARASOTA, FL 34242
Dear Customer,

This is in response to your urgent request for delivery information on the following shipment to:

H.R.AUSTIN
W.HILLS RD.
WARREN VT 05674

Shipper number...3X8296 Pickup Date-
Number of parcels.....1 2/22/89

Merchandise.....Furs Pickup Record #
942783765

WE HAVE BEEN UNABLE TO PROVIDE SATISFACTORY PROOF OF DELIVERY FOR THE ABOVE SHIPMENT.

To file a claim, please send the information listed below to:

UNITED PARCEL SERVICE, DELIVERY INFORMATION P.O. Box 151059
Altamonte Springs Fl 32715
- Your bill to UPS for the replacement cost. Record on your bill LDI No. 07969382 and your Shipper Number.
- A copy of your original invoice to the receiver.

If you have no invoice, send another document describing the contents to substantiate the amount of the lost...

If you use a Parcel Register, a copy of your shipping document.

Sincerely,
UNITED PARCEL SERVICE